No. 86-940

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE and
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

FURTHER REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES F. VULLIET
STEVAN D. PHILLIPS
JONES, GREY & BAYLEY, P.S.
3600 One Union Square
Seattle, Washington 98101
(206) 624-0900

JAMES H. SCHROPP
(Counsel of Record)
JACK B. GORDON
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7000

Attorneys for Pacific First Federal Savings Bank

GARR M. KING
KENNEDY, KING & ZIMMER
2600 PacWest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 228-6191

ARTHUR C. CLAFLIN
BOGEL & GATES
Bank of California Center
900 4th Avenue
Seattle, Washington 98164
(206) 682-5151

Attorneys for Price Waterhouse

ROGER L. MEYER
MEYER, HABERNIGG & WYSE
900 S.W. Fifth Avenue
Suite 1900
Portland, Oregon 97204
(503) 228-8448

CHARLES LEE EISEN
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-9077

Attorneys for Kaplan, Smith & Associates, Inc.

No. 86-940

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE AND
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

FURTHER REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this further reply in response to the Brief For The United States As Amicus Curiae.

1. The United States argues "there is no reason why FHLBB approval of a plan of conversion should preclude application of the securities laws to misstatements and omissions in the offering circular of a converting institution." The relevant issue, however, is not whether the antifraud prohibitions of the securities laws apply to the offer and sale of securities issued by savings institutions. As the United States recognizes, the FHLBB has adopted antifraud regulations applicable to offering circulars, modeled after the SEC's own regulations. *See* 12 C.F.R. § 563b.3(h) (1983); 48 Fed. Reg. 31614-31615 (1983). The narrower issue in this case concerns the appropriate private remedy and, specifically, whether a purchaser can circumvent Congress' restriction on the remedy available in the unique context of a federal agency-approved

mutual-to-stock conversion by framing a challenge to the terms and conditions of the conversion as a securities law claim.

2. The United States argues that the decision of the court below does not conflict with the decisions in *Craft* and *Harr* because in those cases the asserted securities law claims "really" were a challenge to the FHLBB order approving the particular conversion, whereas this is a "garden-variety" fraud case. In this case, however, the court of appeals refused to consider whether the complaint truly stated a claim for securities fraud, even though the district court ruled that the complaint was, as in *Craft* and *Harr*, simply a disguised attack on the FHLBB's order approving the conversion. By contrast, in both *Craft* and *Harr*, the courts dismissed securities law claims on jurisdictional grounds without granting leave to cure pleading deficiencies, as would have been appropriate if the courts had jurisdiction over a "valid," well-pleaded claim.

3. It is difficult to understand the basis for the assertion of the United States that the *amicus* briefs previously filed by the SEC and the FHLBB in *Craft* are consistent with each other and with the decision under review in this case. In *Craft*, the FHLBB argued that the securities law claim that the Crafts "were defrauded by Florida Federal" in connection with its conversion "amounts to nothing more than a challenge to the equitability of Florida Federal's conversion plan as approved by the Bank Board." Brief Of The FHLBB In Support Of Defendant Florida Federal Savings And Loan Association's Motion To Dismiss at 6, *Craft v. Florida Federal Savings and Loan Association*, No. 83-1084-CIV-T-13 (M.D. Fla. 1983). The FHLBB accordingly concluded that the district court's assertion of jurisdiction over the securities claim "would directly impugn the Bank Board's statutorily-imposed mandate to regulate conversions of savings and loan associations," *id.* at 7, and that "[j]urisdiction over the subject matter of [the Crafts'] complaint, if any, would have been in the appropriate Court of Appeals." *Id.* at 10. The SEC, on the other hand, flatly urged the courts of appeals in *Craft* and in this case to rule "that the [FHLBB's] approval of a plan permitting a savings and loan association to convert to a stock company does not divest a federal district court of jurisdiction to consider antifraud claims

under the federal securities laws." Brief Of The SEC, Amicus Curiae at 17, *Craft v. Florida Federal Savings and Loan Association,* 786 F.2d 1546 (11th Cir. 1986).[1]

4. The United States also argues that this case is distinguishable from *Craft* because, *in addition* to the identical allegations in *Craft* and this case concerning the increase in the number of shares sold to the public and in the aggregate offering price approved by the FHLBB, the complaint in this case alleges that the appraisal was affected by false valuations of Pacific First's loan and real estate portfolios, the adequacy of its reserves and its reasonably anticipated future earnings.[2] The United States would thus concede that the court of appeals erred in failing to distinguish those claims which the United States believes may be asserted in district courts and those which must be made in the court of appeals. For this reason alone, certiorari should be granted.

5. The United States also suggests that the Ninth Circuit's decision will not destabilize the conversion process because "only one of the several hundred institutions that have converted under the FHLBB regulations to date has faced *properly*

---

[1] To the extent that the United States intends to suggest that the two agencies are in agreement that district courts have jurisdiction to consider "valid" securities law claims but not claims that are merely in the "guise" of such a claim, the distinction is meaningless. A bogus claim, *i.e.,* a complaint that fails to state a claim under the securities laws, would always be subject to dismissal, on a basis other than jurisdictional grounds. On the jurisdictional issue presented in this petition, the agencies' previous statements are, quite simply, diametrically opposed. The FHLBB understandably may desire to obscure this difference, given the intense criticism the FHLBB has recently received in Congress for its alleged failure to be an aggressive enforcer of the securities laws. *See, e.g., Subcommittee On Oversight And Investigations Of The Committee On Energy And Commerce, U.S. House Of Representatives, 100th Cong., 1st Sess., Consolidation Of The Administration And Enforcement Of The Federal Securities Laws Within The Securities And Exchange Commission* (Comm. Print 1987). However, whether or not there is a particular private remedy does not necessarily affect the enforcement powers or jurisdiction of the agencies. The FHLBB was correct the first time it spoke, when it filed its *amicus* brief in *Craft.*

[2] The district court, of course, considered these "additional" allegations in ruling that the complaint was, as in *Craft,* but a disguised challenge to the FHLBB's order.

alleged claims for securities fraud." (Emphasis added). Given the ease with which securities law claims with little merit but considerable potential settlement value may be brought, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-740 (1975), it would appear that a more likely explanation for the paucity of such cases to date is that, prior to this case, every court to consider the issue (except the district court in *Craft*) has rejected attempts to evade the statutory requirement that a person aggrieved by a conversion must proceed in a court of appeals. The United States cautiously avoids any prediction as to the number of claims which may be filed if the court of appeals' decision is allowed to stand.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of *certiorari* should be granted.

Respectfully submitted,

/S/ JAMES H. SCHROPP

CHARLES F. VULLIET
STEVAN D. PHILLIPS
JONES, GREY & BAYLEY, P.S.
3600 One Union Square
Seattle, Washington 98101
(206) 624-0900

JAMES H. SCHROPP
(Counsel of Record)
JACK B. GORDON
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7000

Attorneys for Pacific First Federal Savings Bank

GARR M. KING
KENNEDY, KING & ZIMMER
2600 PacWest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 228-6191

ARTHUR C. CLAFLIN
BOGEL & GATES
Bank of California Center
900 4th Avenue
Seattle, Washington 98164
(206) 682-5151

Attorneys for Price Waterhouse

ROGER L. MEYER
MEYER, HABERNIGG & WYSE
900 S.W. Fifth Avenue
Suite 1900
Portland, Oregon 97204
(503) 228-8448

CHARLES LEE EISEN
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-9077

Attorneys for Kaplan, Smith & Associates, Inc.